

Blue Circle Cement Company, Inc. and United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boiler-makers, Iron Ship Builders, Forgers and Helpers, AFL-CIO, and its Local D421. Cases 17-CA-16104 and 17-CA-16279

December 14, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On May 21, 1993, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the judge's decision, and the Charging Party and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified, and to adopt the recommended Order as modified.

1. The judge found that the Respondent, after notifying the Union on November 12, 1990, that bargaining had reached an impasse and that it intended on November 19, 1990, to implement specified items from its final bargaining offer,² subsequently violated Section 8(a)(5) and (1) by unilaterally imposing new and different terms and conditions of employment on the unit employees that were not encompassed within the final offer. Two of these changes, which the judge found were substantial and material, involved changes in the Respondent's employee vacation scheduling procedure and in the starting time of the A shift.³ Both of these changes were made without prior notification to or bargaining with the Union.

The Respondent's exceptions to the judge's findings concerning vacation scheduling and the A shift are

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally restricting the location where electricians and maintenance employees could take breaks and lunch, changing the employees' break schedule during its 1992 annual shutdown, and discontinuing time-and-a-half pay for shift employees on their unscheduled workdays, for the reasons stated by the judge.

² There is no contention that the parties were not at impasse.

³ The complaint does not allege that the Respondent's change in the starting times of the B and C shifts were unlawful.

predicated primarily on its argument that it possessed managerial discretion over these matters by virtue of specific contractual provisions in the parties' expired 1987-1990 collective-bargaining agreement. Thus, as to vacation scheduling, the Respondent points to the following contractual provision as authority for its unilateral change, "the final right to allotment of vacation period is exclusively reserved to the Company in order to insure the orderly operations of the plant." Similarly, the Respondent defends its unilateral set back of the usual midnight starting time of the A shift to 11 p.m. on the contract provision that states that "The A, or morning or first shift, shall include work regularly scheduled to commence between 11:00 p.m. and midnight, inclusively."

We reject the Respondent's contention that managerial discretion over these matters in the expired contract authorized its unilateral action. The Board has held that such a contractual reservation of managerial discretion does not extend beyond the expiration of the contract unless the contract provides for it to outlive the contract. See *Holiday Inn of Victorville*, 284 NLRB 916, 916-917 (1987). There is no such provision in the expired contract.⁴

We likewise find no merit in the Respondent's further contention that the change in the starting time of the A shift was justified by its long-standing practice of starting maintenance B shift 1 hour earlier, between May and September of each year, to enable those employees to work during the cooler, early morning temperatures. The record reveals that although the Respondent once had a practice of seasonal fluctuations in the B shift hours the Respondent never set back the starting time of the B shift in either 1990 or 1991, nor had it ever varied the hours of the A or C shifts. Thus, there is no basis for finding that starting maintenance shifts at an earlier time was a term or condition of employment in effect in 1992 based on any consistently applied seasonal fluctuation.

Moreover, the Respondent's earlier practice of setting back the starting times of the B shift was in one respect different from its unilateral change in the A shift starting time in 1992, in that the latter created an overlap of one shift on 2 different workdays, as that term was defined in the expired bargaining agreement. Indeed, the record reveals only one prior incident of the Respondent's having effected a change in work hours involving 2 different days, in 1987 or 1988 when it assigned laborer Bill Ammons to work a 10 p.m. to 6 a.m. shift, and then, only after consultation

⁴ Chairman Gould finds no need to rely on the rationale that any managerial discretion to alter unit employees vacation schedules and shift times unilaterally expired when the parties' contract expired. The General Counsel did not assert this theory of violation in litigating the case. The Chairman relies solely on the judge's findings that the specific contractual provisions cited by the Respondent did not give it the unilateral discretion to make the changes in dispute.

with, and agreement by, the Union to make that an exception to the contract language.⁵

We therefore find that the Respondent's unilateral change in the starting time of the A shift constituted a material and substantial change in the employees' terms and conditions of employment. We further find, in agreement with the judge, that the Respondent committed a closely related violation of Section 8(a)(5) and (1) by dealing directly with unit employees in determining that they preferred to retain the earlier starting times on the B and C shifts.

2. The judge found that the Respondent unilaterally increased health insurance premiums in 1992 in violation of Section 8(a)(5) and (1) of the Act. We reverse. We find merit in the Respondent's contention that, contrary to the judge's finding, the 1992 increase was within the contemplation of the Respondent's final bargaining offer and its letter of implementation.

The judge found, with record support, that the Respondent's contract proposal stated that the new health care program, to be effective January 1, 1991, requires a yearly employee contribution of "20% of Blue Circle America's cost." He further credited the Respondent's notes of the final contract negotiations on November 5 and 6, 1990, that clearly show that the Respondent had explained that "the cost of such insurance would vary annually, based upon the previous year's claims."

The last offer proposal as it appeared in the Respondent's November 12, 1990 letter to the Union reads, *inter alia*, as follows:

MEDICAL AND DENTAL

Change plan same as salaried as follows:

EMPLOYEE CONTRIBUTION

Effective January 1, 1991, 20% of Blue Circle America's cost.

The General Counsel did not contest the Respondent's implementation of the employee contribution provision in 1991, but contended that the 1992 changes in employee contribution rates were unlawful unilateral changes because the Respondent's last offer made no reference to such rate increases in 1992, and thus, the 1992 changes were not contemplated in the implementation of that offer. We find that the judge erred in finding merit to this contention. In this regard, we find that the health insurance bargaining proposal, as explained during the negotiations, called for an annual

⁵ We do not rely on the judge's finding that there is no evidence of a clear and unmistakable waiver by the Union of its statutory right to notice and bargaining over the Respondent's changes in shift starting times.

adjustment in the employees' premium depending on the cost of the previous year's claims. Indeed, the judge found that the parties clearly understood the implemented offer to encompass annual cost-based adjustments in the employees' health care contribution. In these circumstances, we cannot accept the judge's conclusion that because the Respondent did not explicitly refer to the years 1992 or 1993 in the course of contract negotiations, or explain that those years were comprehended by the accompanying oral reference to the term "annual," that it was unlawful for the Respondent to increase the employees' contribution costs for health insurance in 1992.

It is clearly established that "an employer does not violate Section 8(a)(5) by making unilateral changes, as long as the changes are reasonably encompassed by the pre-impasse proposals." *NLRB v. Katz*, 369 U.S. 736, 745 (1962). Here, the 1992 increases in employee contributions, while substantial, as the judge found, were consistent with, and reasonably encompassed by, the Respondent's preimpasse offer. Accordingly, we find that the 1992 increases amounted to a lawful implementation of that offer⁶ and we shall accordingly dismiss this allegation of the complaint.⁷

ORDER

The National Labor Relations Board orders that the Respondent, Blue Circle Cement Company, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the judge's recommended Order as modified below.

1. Delete from paragraphs 1(b) and 2(a) of the Order, respectively, the phrases, "the deductions for health insurance contributions" and "the increases in their deductions for health insurance."

2. Delete paragraphs 2(b) and 2(c) from the Order.

⁶ The General Counsel argues alternatively that even assuming the lawfulness of the Respondent's implementation of the increase in health insurance contributions based on 20 percent of the prior year's actual costs for health claims, the 1992 increase imposed on single employees was unlawful because it exceeded 20 percent. According to the record evidence, calculations of 1991 health claims established the average monthly 20-percent cost for single employees at \$21.34 and for families at \$61.25, and that they were rounded to \$22 and \$60, respectively.

Inasmuch as the amounts of the single and family contributions for 1990, as set forth in the final offer, and as implemented in 1991, were both expressed in whole dollar amounts, we find that the Respondent's rounding of the contributions to whole dollar amounts in 1992 was reasonably comprehended within the preimpasse offer. We accordingly conclude that this alleged unlawful change for single employees, of less than \$8 a year (the annual difference between \$21.34 and \$22 per month), is not a "material, substantial, and a significant one." *United Technologies Corp.*, 278 NLRB 306 (1986); *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978); *Peerless Food Products*, 236 NLRB 161 (1978).

⁷ We shall therefore delete from the judge's Conclusion of Law 4 the words "by increasing employee deductions for both single and family health insurance contributions."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL-CIO, Local D421 as the exclusive representative of our employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, in an appropriate unit consisting of:

All production and maintenance employees employed at our Tulsa, Oklahoma, plant, but excluding plant executives, professional engineers, machine shop foremen, oiling supervisor, electrical foreman, instrumentation engineer, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT make unilateral changes in the location of breaks and lunch (except with respect to the electrical shop), the break schedule, the policy governing the scheduling of vacations, work schedules, rates of pay, or in other terms or conditions of employment covering our bargaining unit employees without prior notice to or bargaining with the Union as the exclusive representative of the bargaining unit described above.

WE WILL NOT deal directly with our employees in the unit described above, with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify and give the Union an opportunity to bargain about any changes in our bargaining unit employees' terms and conditions of employment, including the location of their breaks and lunch periods

(except with respect to the electrical shop), the effects of the ban on using the electrical shop for breaks or lunch, the schedule of breaks during plant shutdowns, the scheduling of vacations, the work schedule of the first shift of the maintenance department, and the pay rate of shift workers when they work on an unscheduled day.

WE WILL, on the Union's request, rescind the restriction on where our bargaining unit employees may take breaks and eat lunch, except for the ban on eating lunch and taking breaks in the electrical shop.

WE WILL, on the Union's request, bargain about the effects of the ban on taking breaks and eating lunch in the electrical shop, on bargaining unit employees.

WE WILL, on the Union's request, rescind the break schedule promulgated during the 1992 plant shutdown period.

WE WILL, on the Union's request, rescind the vacation scheduling policy promulgated on or about March 1, 1992.

WE WILL, on the Union's request, rescind the 11 p.m. starting time of the maintenance department's first shift, and restore the 12:01 a.m. starting time.

WE WILL, on the Union's request, rescind the wage rate reductions imposed on shift employees on or about July 1, 1992, and make them whole for any losses of earning suffered as a result of this reduction, with interest.

BLUE CIRCLE CEMENT COMPANY, INC.

Milford Limesand, Esq., for the General Counsel.
John W. Powers, Esq. (Seyfarth, Shaw, Fairweather & Geraldson), of Chicago, Illinois, for the Respondent.
Mary Elizabeth Metz, Esq. (Blake & Uhlig, P. A.), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. The hearing in this case was held in Tulsa, Oklahoma, on November 9 and 10, and on December 10, 1992. On a charge filed in Case 17-CA-16104 on April 7, 1992,¹ by the Union, United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL-CIO, Local D421 the Acting Regional Director for Region 17 issued a complaint and notice of hearing on May 21 against the Company.

Thereafter, on September 11, on a second charge filed by the Union on August 5 in Case 17-CA-16279, the Regional Director for Region 17 issued a consolidated complaint against the Company. The consolidated complaint alleges that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, by changing the wages, hours, and conditions of employment of its production and maintenance employees without bargaining collectively with the

¹ All dates are in 1992, unless otherwise indicated.

Union, which was the exclusive collective-bargaining representative of those employees. In its answers to the complaints, the Company denied commission of the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures, sells at non-retail, and distributes cement and related products at its facility in Tulsa, Oklahoma. During the 12-month period ending April 30, the Company, in the course and conduct of its business operations, purchased and received, at its Tulsa facility goods valued in excess of \$50,000 directly from points outside the State of Oklahoma. During the same period, the Company, in conducting its business operations, as described above, purchased and received at its Tulsa facility goods valued in excess of \$50,000 directly from points outside the State of Oklahoma. The Company admits, and I find from the foregoing, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Company admits, and I find, that both United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL-CIO, and Local D421 are, and have been at all times material to these cases, labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

B. *The Facts*

1. Background and issues

Since acquiring its Tulsa facility from Martin Marietta Corporation in 1983, the Company has recognized the Union as the exclusive collective-bargaining representative² of the following appropriate unit:

All production and maintenance employees employed at the Company's Tulsa, Oklahoma plant, but excluding plant executives, professional engineers, machine shop foremen, oiling supervisor, electrical foreman, instrumentation engineer, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

At the time it acquired the Tulsa facility, the Company adopted the collective-bargaining agreement between the Union and Martin Marietta, effective from May 1, 1981, until April 30, 1984, covering the production and maintenance employees employed there.

The Company and the Union succeeded in negotiating a 3-year collective-bargaining agreement, covering the Tulsa production and maintenance employees, effective from May 1, 1984, until April 30, 1987. They also reached a second

²On May 22, 1974, the Board certified the Union as the exclusive collective-bargaining representative of the described unit. The Union has enjoyed that status since its certification.

3-year agreement for the Tulsa production and maintenance employees, effective from May 15, 1987, until April 30, 1990. In 1990, the Company and the Union agreed to extend the terms of this agreement while they were in negotiations for a new contract.

In late February 1990, the Company, by letter, notified the Union of its desire to begin negotiations for a new collective-bargaining agreement, and offered proposals. After 12 meetings,³ the last on November 6, 1990, the Company, by letter to the Union, dated November 12, 1990, declared an impasse. In the same letter, the Company announced that, effective November 19, 1990, it would implement designated items from its final offer of August 23, 1990. Thereafter, the Company made unilateral changes in wage rates, hours, vacation scheduling, and other terms and conditions of employment concerning its production and maintenance employees.

The issues raised before me are whether the Company violated Section 8(a)(5) and (1) of the Act by making the following unilateral changes in wages, hours, and other terms and conditions of employment concerning its production and maintenance employees, without giving the Union prior notice and an opportunity to bargain about them:

1. On or about January 1, increasing employee deductions for both single and family health insurance contributions.
2. On or about January 6, restricting the location where maintenance department employees and electricians could take breaks and eat lunch, by requiring them to take breaks and eat lunch only in the main lunchroom.
3. Changing the break schedule during a plant shutdown period, effective from on or about February 3, until March 29.
4. On or about March 1, changing the vacation scheduling policy.
5. On or about May 25, changing the work schedule for the first shift of the maintenance department.
6. On or about July 1, changing the pay rate of shift employees by ceasing the payment of time and a half to shift employees for hours worked on an unscheduled day.

A. *Controlling Principles*

In resolving the issues that these cases present, I have been guided by the following well-settled principles:

Sections 8(a)(5) and 8(d) of the Act require the Company to bargain in good faith with the collective-bargaining representative of the production and maintenance employees at its Tulsa plant, with respect to "wages, hours and other terms and conditions of employment." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). This obligation also required the Company to refrain from imposing new and different wage rates, hours of employment, and conditions of employment, without first giving the Union an opportunity to bargain about them. *NLRB v. Katz*, 369 U.S. 736, 741, 742-743 (1962); *NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 204 (10th Cir. 1982). As unilateral changes affecting wages,

³Theodore Adams, a member of the Union's negotiating team, testified that there were 10 meetings. The Company's notes of the parties' last bargaining session, however, on November 6, 1990, which I received in evidence without objection show that it was the 12th meeting. Dennis White, the Company's chief negotiator, took the notes at that meeting. As I find the contemporaneous notes more reliable than Adams' recollection 2 years later, I have credited the notes.

hours, or other terms or conditions of employment will “rarely be justified by any reason of substance,” they require no showing of an employer’s lack of good faith to be held a violation of Section 8(a)(5) of the Act. *Supra* at 369 U.S. at 743, 747.

Moreover, the Act generally prohibits unilateral changes in the wages, hours, and conditions of employment in an expired collective-bargaining agreement until the parties to that agreement have entered into a new agreement or have bargained in good faith to impasse. *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 (1988). If the parties bargain to impasse, the employer may make changes, but only to the extent that such changes do not substantially differ from its preimpasse proposals made to the union in the course of collective bargaining. *Stone Boat Yard*, 264 NLRB 981, 982 (1983), *enfd.* 715 F.2d 441 (9th Cir. 1983), *cert. denied* 466 U.S. 937 (1984).

2. The unilateral changes

a. Employee deductions for health insurance

In its initial contract proposals included with its request for bargaining, in February 1990, the Company urged revision of the employees’ contributions for health and dental care “to be the same as salaried.” The Company’s nonunion salaried employees were required to contribute 20 percent of the cost of their health insurance.

In the negotiations that followed, the Company sought agreement that the Tulsa production and maintenance employees pay 20 percent of the cost of their health care insurance. The Company also explained that the cost of such insurance would vary annually, based on the previous year’s claims. The Company’s notes of the final negotiations on November 5 and 6, 1990, which I received in evidence, clearly show its position and its explanation.

Absent from the testimony or the bargaining notes before me was any showing that the Company told the Union that premiums would be changed only in 1991. There was no testimony, however, that the Company explicitly proposed an increase for 1992. Indeed, I find from the testimony of Theodore A. Adams, a union negotiator, that the Company did not mention 1992 or 1993 in the course of negotiations regarding health insurance premiums (Tr. 59).

Among the specific last offer proposals that the Company attached to its letter of November 12, 1990, to the Union, and implemented on November 19, 1990, were the following, regarding employee contributions to their health insurance:

MEDICAL AND DENTAL

Change plan same as salaried as follows:

EMPLOYEE CONTRIBUTION

- Single \$16/month (after tax amount approx. \$11.20)
- Family \$40/month (after tax amount approx. \$28.00)
- Effective January 1, 1991, 20% of Blue Circle America’s cost.
- Employees may pay monthly contribution with pre-tax dollars.

On January 7, the Company notified all Tulsa employees that it had increased their 1992 monthly contributions to health insurance costs as follows:

CONTRIBUTIONS

CURRENT	1992
Single \$20.00	\$22.00
Family \$50.00	\$60.00

The Company made the decision to increase its Tulsa plant employees’ wage deductions for health insurance premiums and implemented it without prior notice to the Union, and without affording the Union any opportunity to bargain about the contemplated increase.

The Board has recognized that an employer has an obligation to bargain with its employees’ collective-bargaining representative regarding substantial and significant changes in an element of a health insurance provision. *Tecumseh Products Co.*, 285 NLRB 781, 785 (1987). Here, I find that the Company’s imposition of its decision to increase its Tulsa plant employees’ wage deductions for health insurance, was a unilateral change not contemplated in the implementation of its last contract proposal in 1990. I also find that the increases were substantial, \$24 per year for single employees, and \$120 per year for employees with family coverage. I further find that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing these increases in 1992.

b. Restrictions on where maintenance employees and electricians could take breaks and eat lunch

Prior to early January, the Company did not maintain any restrictions regarding where maintenance employees or electricians could take their 15-minute breaks or their 35-minute lunchbreaks at its Tulsa plant. The electricians, and at least some of the maintenance employees, took their breaks and ate lunch in the Tulsa plant’s electrical shop. Until a change in company policy in early January, some maintenance employees and electricians took lunchbreaks outside the plant. Other maintenance employees lunched in a designated maintenance lunchroom at the main building, approximately 100 feet away from the electrical shop.

The parties’ collective-bargaining agreements did not include any provision regarding where employees could take their breaks or where they could have lunch. Nor did the Company’s last offer, as implemented by its letter of November 12, 1990, include any provision regarding either the unit employees’ breaks, or where they were to have lunch.

In early January, the Company’s maintenance manager, Jim King, without prior notice to the Union, and without giving it any opportunity to bargain about his decision, devised and promulgated a policy regarding where the Tulsa plant’s maintenance employees and electricians would take their breaks and eat lunch. King ordered that, henceforth, the maintenance employees and electricians were to take their breaks and eat lunch in the designated maintenance lunchroom, in the Tulsa plant’s main building. King’s order did not change the length of breaks or lunch periods.

I find from King’s undisputed testimony that management control of the employees and employee safety impelled this new restriction. King saw that maintenance and electrician foremen needed to know where employees were during breaks and lunch. If the electricians and maintenance employees were congregated in one room, their immediate su-

pervisors could easily find them and advise them of changed work assignments and other job-related matters.

Another factor in King's thinking was safety. The electrical shop was a hardhat and a safety glass area. Yet electricians and maintenance employees were not wearing either item when either taking breaks or lunching there. The designated maintenance lunchroom was not subject to hardhat or safety glass requirements.

King also considered the hazard presented by a vat of parts cleaning solvent standing in the electrical shop. I find from a material safety data sheet (MSDS), received in evidence, without objection, that the solvent, Safety-Kleen Immersion Cleaner and Cold Parts Cleaner 699, is toxic. The MSDS shows that inhalation, skin and eye contact, and skin absorption are the primary routes of absorption. King knew that Federal Mine Safety and Health Administration regulations prohibited the Company from allowing employees to consume or store food or beverages in an area exposed to the Safety-Kleen.⁴

During the week of January 6, Maintenance Manager Jim King⁵ and his subordinate supervisors advised their electricians and maintenance employees of the new policy regarding breaks and lunch. On or about January 7, electricians Gene Whisman and Stanley Prather learned of the new restrictions from Electrical Supervisor Bob Pratt. Later, on the same day, Jim King confirmed Pratt's advice. King told electricians Gene Whisman, Stanley Prather, and Buddy Carr that they were to take their breaks in the lunchroom at the main building, where he could keep track of them. During the same week, Jim King told maintenance employee Robert L. Thomas Jr. and two other maintenance department employees that their breaks, including lunch, were henceforth restricted to the lunchroom area at the main building.

At a maintenance department safety meeting, Supervisor Mike DePriest announced that, henceforth, maintenance employees would take all breaks and eat lunch in the maintenance lunchroom at the main building. Maintenance employee Gerald Blankenship asked DePriest why it was necessary to impose the new strictures. Supervisor Frank Vargas explained that the supervisors wanted the maintenance employees to be all in one place, where they could be located easily. The plain meaning of the announcements of the new restrictions was that the electricians and maintenance employees could no longer take off-premise lunchbreaks. In any event, neither King nor any of his subordinate supervisors assured either the electricians or the maintenance employees that they could take lunchbreaks off the plant grounds.

On January 7, Supervisor Vargas told maintenance employee Rodolfo C. Martinez that, henceforth, his regular breaks and lunchbreaks would be restricted to the maintenance lunchroom, in the main building. Martinez also testified that he heard from other employees that Jim King had told electrical and maintenance employees that they could

take lunchbreaks outside the plant premises. I have not credited this uncorroborated hearsay, to which counsel for the General Counsel objected.

I find that on or about January 6 the Company made a substantial change in a term and condition of employment, when it changed its policy regarding where its electricians and maintenance employees could take breaks and eat lunch. *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1191. (1986). King's legitimate concerns about notifying employees of changed assignments, and removing them from areas where they were required to wear hardhats and safety glasses did not permit the Company to ignore its bargaining obligation and initiate such changes unilaterally. *McCotter Motors Co.*, 291 NLRB 764, 769 (1988).

Confronted with Federal regulations prohibiting use of the electricians' shop as a location for eating lunch, the Company could lawfully, without consultation with the Union, ban such use by bargaining unit employees. *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987). The Company was not free to impose this restrictive policy, however, without notifying the Union of the change and offering to consult the Union about the effects of the change and about an alternative break and lunch location. Nor was the Company free to impose its new restriction beyond the electrical shop, to the entire plant, and outside its walls, unilaterally. Prior to implementing this latter policy change, the Act required that the Company provide the Union with notice of its intention and an opportunity to bargain about the change, on behalf of the unit employees. I find that by its neglect to notify or consult with the Union about effects of its ban on eating lunch and taking breaks in the electrical shop, and before instituting the broader new policy, the Company violated Section 8(a)(5) and (1) of the Act.

c. The change in the break schedule during annual shutdown

The Company annually shuts the Tulsa plant down for maintenance during the first quarter of the calendar year. During the shutdown, the lengths of daily shifts vary from 8 to 16 hours. I find from Maintenance Manager King's uncontradicted testimony that in the 1988 and 1989 shutdowns, the Company scheduled only 8-hour shifts, and provided breaks at 2-1/2 hour intervals. I find from the uncontradicted testimony of four employees, however, that in the other years prior to 1992, the Company provided breaks at 2-hour intervals during shutdowns. Thus, employees took a break 2 hours after their shift began, a lunch period after 4 hours of work, and subsequent breaks in intervals of 2 hours until they completed their shift.

In 1992, the shutdown covered several weeks during the first calendar quarter. The Company scheduled two shifts for the 1992 shutdown: 6 a.m. to 4 p.m. and 4 p.m. to 2 a.m.

In January, shortly before the shutdown began, Maintenance Manager King and Supervisors DePriest and Vargas met with the day-shift maintenance employees. Among the matters King discussed at this meeting, was the coming shutdown. King announced that the shutdown's work schedule would differ from previous work schedules. The employees would work a straight 10-hour shift with their breaks coming at 2-1/2-hour intervals. The employees' lunchbreak would be

⁴ 30-C.F.R. § 56.20014 provides:

No person shall be allowed to consume or store food or beverages in a toilet room or in any area exposed to a toxic material.

⁵ Jim King testified that he did not remember "speaking directly to the employees to make this change." Employees Gene Whisman, Buddy Carr, Stanley Prather, and Robert Thomas, however, all testified that they heard about the change directly from King. King did not deny their uncontradicted assertions, which I have credited.

scheduled 2-1/2 hours after the first break.⁶ According to King's testimony, he made the change in the break schedule because "[i]t made the work times a lot more manageable."

The Company did not notify the Union of the contemplated change. Nor did the Company invite the Union to engage in negotiations before imposing the new break schedule on bargaining unit employees. Neither the parties' collective-bargaining agreements nor the Company's last offer, as implemented in November 1990, contain any reference to break schedules.

On February 3, during the 1992 shutdown, Supervisor Ronnie Glover announced to a safety meeting attended by unit employees working on the 4 p.m. to 2 a.m. shift, that they would take their breaks at 2-1/2-hour intervals. Glover instructed his listeners to take their first break at 6:30 p.m., take their lunchbreak at 9 p.m., take a break at 11:30 p.m., and leave the plant at 2 a.m. He also told the assembled employees that the day-shift employees would have 2-1/2-hour intervals between their breaks.⁷

Here, again, the Company substantially altered a condition of employment without consulting the Tulsa plant employees' bargaining representative. In this instance, the condition of employment had not been covered either by the expired contract or the Company's last offer in 1990, and was a mandatory subject of bargaining. Thus, I find that the Company again violated Section 8(a)(5) and (1) of the Act. *McCotter Motors Co.*, 291 NLRB 764, 769 (1988).

d. *The change in vacation scheduling*

Article X, section 3 of the 1987-1990 collective-bargaining agreement between the Company and the Union declared that "the final right to allotment of vacation period is exclusively reserved to the Company in order to ensure the orderly operation of the plant." Section 4 of the same article made the following provision for vacation scheduling:

In scheduling vacations, employees will be allowed until March 1 to indicate their preferences. Four (4) employees from the Maintenance Department, two (2) employees from the Quarry Department and two (2) employees from the Shipping Department will be allowed vacations at the same time provided that such employees are in different job classifications.

In section 6 of the same article, the Company agreed to discuss scheduling of vacations with the Union, as follows:

The Company agrees to meet with the Local Plant Committee once each year to discuss the Company's scheduling of as liberal a vacation allotment plan as possible consistent with operational requirements.

The Company's last offer in August 1990 did not include any provision concerning vacation scheduling. There was no showing that the negotiations leading up to the Company's letter of November 12, 1990, announcing an impasse, touched on vacation scheduling. Nor did the implemented

portions of the Company's last offer include any provision covering vacations or vacation scheduling.

Prior to 1992, the Company granted or denied vacation requests received from bargaining unit employees on or before March 1 on the basis of the requesting employee's seniority. When received from bargaining unit employees after March 1, the Company treated them on a first-come-first-serve basis. The Company permitted unit employees to save some of their accrued vacation for requests that they might make later in the year, on short notice to their supervisors. Employees used their accrued vacation time for leisure, sick leave, emergencies, or other purposes.

In 1991, the Company's operations manager, Douglas Pardee, noted that his plant's operations suffered when a substantial number of his employees waited until late in the year to schedule vacations during the hunting and holiday seasons. Thus, during the last few months of the year, the Company found itself with insufficient vacation relief employees to fill in for the vacationers. The Company was operating the plant shorthanded. In addition, Pardee was troubled that the Company was paying a substantial amount for unused vacation time.

Early in 1992, Pardee instructed his supervisors to pressure their employees to submit vacation requests by March 1. The Company would grant those requests according to seniority. After that date, if the employee had not filed a vacation schedule or had filed only a partial schedule, the Company would schedule the employees' unscheduled vacation time for 1992, according to its operating needs. In the event an employee wanted to change a vacation period chosen for him or her, he or she had to ask the Company.

Plant supervisors disseminated Pardee's instructions to the Tulsa plant employees. The record shows instances of such dissemination. In late February, or early March, the Company's production manager, Frank Slosar, explained the new vacation policy to employee Robert Thompson. Slosar approached Thompson and urged him to apply for his entire vacation. Slosar said that Pardee wanted employees to put in for their vacations before March 1. In mid-March, Supervisor Ronnie Glover told employee Theodore Adams that employees were required to submit their vacation schedules to the Company and that if they did not comply, the Company would schedule their vacations for them.

Operations Manager Pardee devised and implemented the Company's new policy regarding vacation scheduling without prior notice to the Union. Nor did he afford the Union any chance to negotiate with the Company before he imposed it on the Tulsa plant's bargaining unit employees.

I find that the Company's new restriction on its plant employees' freedom to schedule vacations was a substantial change affecting a condition of employment. Notwithstanding that it had the last word on vacation scheduling for bargaining unit employees, the Act required that the Company give the Union an opportunity to negotiate modifications in the contemplated policy change before putting it into effect. I find that the Company violated Section 8(a)(5) and (1) of the Act by implementing this new vacation policy without notifying and bargaining with the Union. *Paramount Poultry*, 294 NLRB 867, 869 (1989).

⁶I based my findings regarding the January meeting and King's announcements regarding the shutdown on employee Gerald Blankenship's testimony.

⁷I based my findings regarding Supervisor Glover's remarks and the meeting of February 3 on employee Theodore Adams' testimony.

e. *Changing the work schedule for the first shift of the maintenance department*

Article VI, section 4(a) of the 1987–1990 collective-bargaining agreement between the Company and the Union, defined the workweek and the workday as follows:

For the purpose of this Agreement it is understood that the workweek shall begin on Monday at 12:01 a.m. and extend to Sunday at 12:00 p.m. midnight. Each work day [sic] shall start at 12:01 a.m. and end at 12:00 p.m.

Section 4(b) of the same article regulated 8-hour shifts that began at times other than 7 to 9 a.m., as follows:

Any shift personnel who are to begin their workday at times other than 7:00 a.m. to 9:00 p.m. shall have a shift consisting of eight (8) straight hours, with no set time for lunch. This shift shall be within one 24-hour period, defined in the contract as the workday. The employee will take only the necessary time to eat, and will have his lunch as time permits.⁸

Article IX, section 4, of the same agreement, entitled “Wages and Shift Differentials” provided:

For the purpose of this Article, shifts shall be identified in accordance with the following:

The A, or morning or first shift, shall include work regularly scheduled to commence between 11:00 p.m. and 12:00 midnight, inclusively.

The B, or second or day shift, shall include work regularly scheduled to commence between 7:00 a.m. and 8:00 a.m., inclusively.

The C, or third or evening shift, shall include work regularly scheduled to commence between 3:00 p.m. and 4:00 p.m., inclusively.⁹

In 1987 or 1988, the Company consulted the Union about assigning a laborer, Bill Ammons on a 10 p.m. to 6 a.m. shift. Initially, the Union was troubled because the shift included hours in 2 different days. The Union agreed, however, to make an exception to the contract language. It agreed to allow Ammons to work the proposed shift. The Company has continued to assign Ammons to that shift.

In 1992, the Company altered the working hours of bargaining unit employees. For the 7 or 8 years preceding May 18, the A shift for maintenance employees was midnight to 8 a.m., Monday through Friday. On May 14, Maintenance Manager King posted a schedule for the week of May 18, showing A shift maintenance employees Thomas and Huddleston working from midnight to 8 a.m., on Monday May 18, and from 11 p.m. to 7 a.m., Tuesday, May 19, through Friday, May 22. The Company kept Thomas and Huddleston on that same schedule for the week of May 25. Since May

26, Thomas and Huddleston have worked only 11 p.m. to 7 a.m. shifts, Monday through Friday.

In May 1992, the Company also changed the hours of the B shift maintenance employees from 8 a.m. to 4:30 p.m., to 7 a.m. to 3:30 p.m. At the same time, the Company altered the C shift’s schedule, moving it up 1 hour from 4 p.m. to midnight to 3 p.m. to 11 p.m.

I find from Jim King’s testimony that the Company made these shift hour changes to accommodate the B shift employees, who expressed a preference for the earlier schedule, to allow them to work in the cooler portion of the day. Later, in September, the Company desisted from restoring the three shifts to their pre-May 1992 hours, after having an employee sound out the maintenance employees as to their preference. When the employee advised Maintenance Manager King that the employees preferred the status quo, the Company acceded to their sentiment.

The Company did not give notice to the Union of its intent to change the maintenance department’s work schedules. Nor did the Company notify the Union in September, when another possible change was under consideration. Neither King nor any other member of the Company’s management afforded the Union any opportunity to bargain either about the May 1992 changes or about the decision in September to maintain the status quo, on behalf of the maintenance department employees, all of whom were included in the bargaining unit.

I find no merit in the Company’s contention that the Union waived its statutory right to bargain on behalf of the unit employees regarding the alteration of the first shift’s starting time. According to the Company, the terms of article IX, section 4 of the 1987–1990 agreement gave it a 1 hour grace period, between 11 p.m. and 12:01 a.m., within which it was free to move the first shift’s starting time, unilaterally. However, as I read that section, it applies only to the wages and differentials that article IX addresses.

Article VI, section 4(a) of the 1987–1990 agreement clearly provided that each work day would begin at 12:01 a.m. and end at midnight. Section 4(b) of that article provided that shift personnel beginning their workday at times other than 7 a.m. to 9 a.m. would have 8 straight hours, and that any such shift would be within 1 workday, as defined in section 4(a). Thus, I find from the clear language of article VI that the 1987–1990 contract did not give the Company license to ignore the Union when it altered the maintenance department’s first shift’s starting time.

Assuming that article IX, section 4 created ambiguity as to the meaning of article VI, section 4(a) and (b) of the 1987–1990 agreement, however, I find such ambiguity does not support the Company’s position. For, while a union is free to waive its right to be consulted about a change affecting the starting time of a shift, such a waiver must be “clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989). Here, there was no “clear and unmistakable” waiver.

Nor did the Union’s past acquiescence in the Company’s unilateral scheduling of shifts extending from one workday to the next, without more, constitute a waiver of any right the Union had to bargain about the Company’s 1992 decision to change the starting time of the maintenance department’s first shift. *Johnson-Bateman Co.*, 295 NLRB at 188. Thus, I find that the Company’s unilateral implementation of its de-

⁸ Art. VI, secs. 4(a) and (b) in the 1984–1987 agreement, between the Company and the Union, covering the Tulsa plant bargaining unit, contains the same language as art. VI, sec. 4(a) and (b) in the 1987–1990 agreement.

⁹ Art. IX, sec. 4 of the collective-bargaining agreement between the Company and the Union for the years 1984–1987 contains the same language found in art. IX, sec. 4 of the 1987–1990 agreement between the same parties, for the same bargaining unit.

cision to change the starting time of that shift, without providing the Union with prior notice and an opportunity to bargain violated Section 8(a)(5) and (1) of the Act, as alleged.

I also find that by dealing directly with bargaining unit employees, instead of the Union, regarding the starting time of the B and C shifts, the Company violated Section 8(a)(5) and (1) of the Act. *San Antonio Portland Cement*, 277 NLRB 309, 314 (1985).¹⁰

f. Discontinuing the payment of time and a half to shift employees for hours worked on unscheduled days

The Company employs 16 bargaining unit employees at its Tulsa plant, who, unlike the other unit employees, work on all the Company's three shifts, on a rotating basis. Unlike other bargaining unit employees, these same 16 employees, referred to as shift employees, do not have fixed times for breaks or lunch. The other employees in the bargaining unit do not receive a paid lunchbreak. The shift employees do. During the annual plant shutdown, the Company does not usually change the shift employees' hours. During such periods, the Company does change the hours of nonshift employees.

Article VI, section 6 of the 1987-1990 contract between the Company and the Union provided overtime and premium rates for Sunday, holidays, and the seventh consecutive day of an employee's workweek. Neither article VI, however, nor any other provision of that agreement provided premium or overtime pay rates for hours worked on an employee's normal off-day. The implemented portions of the Company's last offer, as set out in its letter of November 19, 1990, included a table of overtime and premium pay rates that superseded the cognate provisions in the 1987-1990 agreement.

As of November 19, 1990, and until the end of June, the Company paid shift employees time and one half for working on what were their normal days off. In early June, electrician Buddy Carr, who was aware of the shift employees' advantage, complained to Maintenance Manager Pardee that the Company was paying electricians only straight time for working on Sundays and on their days off. On or about June 22, the Company ceased paying the time-and-one-half rate to shift employees when they worked on their regular days off. At the time the Company made this change, the time-and-one-half rate had become a term and condition of employment for the shift employees, apart from either the 1987-1990 contract, or the implementation of its last offer in 1990. The Company took this action unilaterally, without affording the Union either prior notice, or opportunity to negotiate, and thus violated Section 8(a)(5) and (1) of the Act. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 784 (1991).

¹⁰ Although the amended consolidated complaint did not allege a direct dealing violation, the amended complaint does challenge the Company's avoidance of the Union in the course of making changes in the Tulsa plant employees wages, hours and conditions of employment. At the hearing, and in its posthearing brief, the Company had the opportunity to, and did, litigate fully this conduct. I find that direct dealing with employees is closely related to that allegation. Accordingly, I find that Board policy permits me to find this additional violation. *Facet Enterprises*, 290 NLRB 152, 153 (1988).

CONCLUSIONS OF LAW

1. Respondent Blue Circle Cement Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL-CIO and Local D421, respectively, are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material to these cases, the Union has been the exclusive collective-bargaining representative of the following appropriate unit:

All production and maintenance employees employed at the Respondent's Tulsa, Oklahoma plant, but excluding plant executives, professional engineers, machine shop foremen, oiling supervisor, electrical foreman, instrumentation engineer, guards, watchmen, and supervisors as defined in the National Labor Relations Act, as amended.

4. By unilaterally changing the wages, hours, and other terms and conditions of employment of its bargaining unit employees, i.e., by increasing employee deductions for both single and family health insurance contributions, by restricting the location where maintenance employees and electricians could take breaks and eat lunch, changing the break schedule during a plant shutdown period, changing its vacation scheduling policy, changing the work schedule for the first shift of the maintenance department employees, and by discontinuing the payment to shift employees of time and a half for hours worked on an unscheduled day, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By dealing directly with employees in the collective-bargaining unit described above with respect to hours of employment, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Thus, I shall order that Respondent rescind the increase in the unit employees' deductions for family and single health insurance coverage, and reimburse the bargaining unit employees for the amounts of the increases they were required to pay since January 1, 1992. I shall also order Respondent to rescind its restriction regarding where electricians and maintenance department employees may take breaks and eat lunch, except with respect to the electrical shop: Provided, that Respondent, on the Union's request, bargain collectively about the effect of the electrical shop ban. I shall also order Respondent to rescind the break schedule that it promulgated during the 1992 plant shutdown, as well as the new vacation schedule that it imposed in March 1992. I shall also order Respondent to restore the starting time of the maintenance department's first shift to 12:01 a.m.. I shall further order Respondent to restore the payment to shift employees of time and a half for hours

worked on unscheduled days. Backpay for lost earnings resulting from Respondent's unilateral changes shall be computed as described in *Ogle Protection Service*, 183 NLRB 682, 683 (1970). Interest for backpay and reimbursements shall be computed as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Blue Circle Cement Company, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union as the exclusive representative of its employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, in an appropriate unit consisting of:

All production and maintenance employees employed at the Respondent's Tulsa, Oklahoma plant, but excluding plant executives, professional engineers, machine shop foremen, oiling supervisor, electrical foreman, instrumentation engineer, guards, watchmen, and supervisors as defined in the National Labor Relations Act, as amended.

(b) Making unilateral changes in the deductions for health insurance contributions, the location of breaks and lunch (except with respect to the electrical shop), the break schedule, the policy governing the scheduling of vacations, work schedules, rates of pay, or in other terms or conditions of employment covering bargaining unit employees, without prior notice to or bargaining with the Union as the exclusive representative of the bargaining unit described above.

(c) Dealing directly with employees in the unit described above with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify and give the Union an opportunity to bargain about any changes in the bargaining unit employees' terms and conditions of employment, including the increases in their deductions for health insurance, the location of their breaks and lunch periods (except with respect to the elec-

trical shop), the effect of the ban on using the electrical shop for breaks or lunch, the schedule of breaks during plant shutdowns, the scheduling of vacations, the work schedule of the first shift of the maintenance department, and the pay rate of shift workers when they work on an unscheduled day.

(b) On the Union's request, rescind the increases in the bargaining unit employees' deductions for health insurance, which became effective on January 7, 1992.

(c) Reimburse bargaining unit employees for the increases in deductions for health insurance contributions that were taken from their wages on and after January 7, 1992, with interest.

(d) On the Union's request, rescind the restriction on where bargaining unit employees may take breaks and eat lunch, except for the ban on eating lunch and taking breaks in the electrical shop.

(e) On the Union's request, bargain about the effects of the ban on taking breaks and eating lunch in the electrical shop, on bargaining unit employees.

(f) On the Union's request, rescind the break schedule promulgated during the 1992 plant shutdown period.

(g) On the Union's request, rescind the vacation scheduling policy promulgated for bargaining unit employees, on or about March 1, 1992.

(h) On the Union's request, rescind the 11 p.m. starting time of the maintenance department's first shift, and restore the 12:01 a.m. starting time.

(i) Rescind the wage rate reductions imposed on shift employees on or about July 1, 1992, and make them whole for any losses of earning suffered as a result of this reduction, with interest in the manner set forth in the remedy section.

(j) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(k) Post at its plant in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(l) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."